IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 247

THE PUYALLUP TRIBE, a Federal Organization,
Petitioner,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
and the
DEPARTMENT OF FISHERIES OF THE
STATE OF WASHINGTON,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., AS AMICUS CURIAE

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STATEMENT OF INTEREST

The Association on American Indian Affairs, Inc., a non-profit membership corporation chartered under the laws of the State of New York, is devoted to protecting the rights and promoting the welfare of American Indians. The largest Indian-interest organization in the

country, with over 25,000 members, the Association supports or conducts development programs among Indian communities which range from Eskimo villages north of the Arctic Circle in Alaska to the newly recognized Miccosukee Tribe residing in the Florida Everglades. Because of its deep and long-standing concern with the rights of Indians under the Constitution, statutes and treaties of the United States, the Association has submitted briefs, *amicus curiae,* to this Court in *Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685 (1965), and *Menominee Tribe* v. *United States,* No. 187, October Term, 1967, and to various Federal Courts of Appeals in such leading cases as *Oliver* v. *Udall,* 306 F. 2d 819 (D.C. Cir. 1962), *Iron Crow* v. *Oglala Sioux Tribe,* 231 F. 2d 89 (8th Cir. 1956), and *Arizona* v. *Hobby,* 221 F. 2d 498 (D.C. Cir. 1954).

The Association's particular interest in the case at bar is to secure not only for petitioner, but also for Indians throughout the country a clear, current ruling that the agreements their ancestors signed in years past still are meaningful and must be respected. Specifically, the holding of the Washington Supreme Court that, notwithstanding treaty language to the contrary, the State may restrict fishing by members of the Puyallup Tribe at sites located both within and without their reservation on the same basis as all other citizens raises once again a serious question about the continued vitality of Indian treaties generally. *Cf. Federal Power Comm.* v. *Tuscarora Indian Nation,* 362 U.S. 99, 136-142 (1960) (dissenting opinion); *Seneca Nation of Indians* v. *Brucker,* 262 F. 2d 27 (D.C. Cir. 1958), *cert. den.* 360 U.S. 909 (1959). The Association's experience in working on community development projects indicates that when their ancient rights stand so

in jeopardy, and their culture as well as their economy thus are threatened, progress for Indians just stops.

The Association also has a major interest in encouraging and assisting Indian tribes voluntarily and in orderly fashion to assume ever-increasing responsibility for the conduct of their own affairs. The decision of the court below that the Puyallup Tribe is subject to suit absent consent of the Indians or the United States violates a hitherto well-settled principle of Federal law and, without any transition period, would impose upon tribes burdens which neither they nor Congress have yet seen fit to allow. Since the traditional doctrine of sovereign immunity serves today mainly to insulate the fragile structure of tribal governments and enterprises from outside harassment, the blanket withdrawal of such immunity at this time is likely to cause significant social and economic disruption.

In short, the Association's primary concern herein is to ensure that the treaty rights of the Puyallup Indians and other tribes in Washington, Oregon and Idaho, whose fishing rights were guaranteed by similar treaties, are both fully protected as a matter of law and also recognized as fully consistent with a workable national program for Indian advancement. This brief, *amicus curiae,* is filed pursant to Rule 42(2) of the Supreme Court Rules. Written consent of all parties to its submission accompanies the signed original copy of the brief.

STATEMENT OF THE CASE

This case started more than one hundred years ago. On December 26, 1854, Isaac S. Stephens, Governor and Superintendent of the Territory of Washington, and his delegation, met at Medicine Creek with representa-

tives of "the tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets," to execute a treaty providing for the cession to the United States of most of the vast area these Indians, including petitioner, then occupied. 10 Stat. 1132. Excepted out of the foregoing grant were (1) certain relatively small described tracts of land (Article II), and (2) "The right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory." (Article III)

The Puyallup Reservation, established in accordance with the Treaty of Medicine Creek, subsequently was expanded by the Executive Orders of January 20, 1857, and September 7, 1873. The Puyallup River flows through the reservation, emptying into Commencement Bay. Relying upon the treaty commitment described above, the Puyallup Indians fished in the waters of the Puyallup River and Commencement Bay within, and at usual and accustomed places outside, their reservation for almost a century with little or no interference.

In 1954, however, the State charged one Robert Satiacum, a Puyallup Indian, with fishing in violation of the Washington conservation laws, to wit: the possession of game fish during a closed season and the use of fixed nets to catch game fish at two locations, one a usual and accustomed fishing ground of the Puyallup Indians outside the reservation and the other a site inside the Puyallup Reservation, although on land not then in Indian ownership. The case eventually was appealed to the Washington Supreme Court, which affirmed a decision of the Superior Court dismissing the prosecution. *State* v. *Satiacum,* 50 Wash. 2d 524, 314 P. 2d 400 (1957).

Some ten years later, the State once again has sought to restrain members of the Puyallup Tribe from exercising fishing rights secured to them by the United States, this time through the device of a civil declaratory judgment proceeding aimed at the entire tribal membership. Specifically, respondents instituted this action in the Superior Court of the State of Washington through the filing of a complaint alleging that Puyallup Indians were engaged in net fishing in the Puyallup River watershed and Commencement Bay in violation of the regulations of the State Department of Fisheries, and requesting a judgment declaring that the Puyallup Tribe, Inc.[1] and certain named individual defendants were not entitled to any privileges and immunities from application of State conservation measures. Petitioner answered by challenging the court's jurisdiction and asserting, as an affirmative defense, that neither the Puyallup Tribe nor the individual defendants as members thereof are subject to State conservation laws when exercising fishing rights reserved to such tribe by the Treaty of Medicine Creek.

On May 27, 1965, the Superior Court entered its Memorandum Decision holding (1) that there is no Puyallup Tribe which succeeds in interest to the rights of the Puyallup signers of the Treaty of Medicine Creek, (2) that the Puyallup Reservation, established in accordance with that treaty, has ceased to exist, and (3) that, despite its finding that Indian fishing (in

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[1]As the Washington Supreme Court pointed out: "The case caption is erroneous, there being no entity known as the Puyallup Tribe, Inc., a corporation." Opinion below, reprinted in Appendix to Petition for Writ of Certiorari (hereinafter "Pet. A —") at p. 36 (fn.).

1964) accounted for only 3-5% of the total catch, the regulations sought to be enforced by the State were reasonably necessary for the preservation of salmon and steelhead fish. Subsequently, the court entered a decree enjoining all members of the Puyallup Tribe from fishing in the Puyallup River watershed and Commencement Bay except in compliance with the rules and regulations of the Department of Fisheries.

Upon appeal by the tribe, the Washington Supreme Court reversed the lower court's finding that the Puyallup Tribe no longer was in being, but held (1) that the Puyallup Reservation had ceased to exist, and (2) that members of the Puyallup Tribe exercising treaty-reserved fishing rights are subject to restrictions by the State not shown to be indispensable to preservation of the fishery. Although the petitioner and *amicus curiae* again challenged the Superior Court's jurisdiction, the court below failed to rule upon the key question of whether the Puyallup Tribe enjoys soverign immunity from suit. Because the original injunction entered by the lower court, reflecting its determination that the Puyallup Indians had no treaty fishing rights, prohibited members of petitioner from fishing contrary to all regulations of the Department, the Supreme Court remanded the case "for entry of a judgment and decree predicated upon the proposition that the defendants do have treaty rights, but that they are subject to conservation regulations which are reasonable and necessary to preserve the fishery." Pet. A-52.

The opinion of the Washington Supreme Court, issued January 12, 1967, became a final judgment two months thereafter. On June 2, 1967, the Superior Court entered its amended injunction permanently re-

straining all members of petitioner "from driftnet or setnet fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington." Pet. A-68. This Court granted certiorari on December 18, 1967.

QUESTIONS PRESENTED

I. Whether Indians exercising the rights guaranteed pursuant to treaty with the United States to fish within their reservation boundaries and at usual and accustomed sites located outside of the reservation are subject to State regulations not shown to be indispensable to the preservation of the fishery.

II. Whether a recognized tribe of American Indians may be sued without its consent or that of the United States.

ARGUMENT

I. THE DECISION OF THE WASHINGTON SUPREME COURT THAT THE STATE POSSESSES GENERAL AUTHORITY TO CONTROL FISHING BY PUYALLUP INDIANS, REGARDLESS OF THE SITE OF THAT ACTIVITY, CONTRAVENES THE TREATY OF MEDICINE CREEK.

A. Members of the Puyallup Tribe Fishing Within the Exterior Boundaries of Petitioner's Reservation Are Not Subject To Any State Regulation.

As partial consideration for petitioner's cession of substantial and valuable lands under the Treaty of December 26, 1854, 10 Stat. 1132, the United States established the Puyallup Reservation and guaranteed the Puyallup Indians a continuing right of taking fish

at all usual and accustomed places.[2] This Court and the lower Federal courts uniformly have upheld the power of Indians freely to fish within the exterior boundaries of their reservations without interference from State authorities. *United States* v. *Winans,* 198 U.S. 371 (1905); *Moore* v. *United States,* 157 F. 2d 760 (9th Cir. 1946), *cert. den.* 330 U.S. 827 (1947); *Mason* v. *Sams,* 5 F. 2d 255 (W.D. Wash. 1925); *In re Blackbird,* 109 Fed. 139 (W.D. Wis. 1901); see *Organized Village of Kake* v. *Egan,* 369 U.S. 60, 75 (1962). Moreover, since Indian treaties contemplate retention by the tribes in lands set aside for their use of all previously existing privileges and immunities, the right to fish within the boundaries of the reservation exclusive of State restrictions does not depend upon the existence of express treaty language so providing.[3] *United States* v. *Winans, supra; Moore* v. *United States, supra;* see *Winters* v. *United States,* 207 U.S. 564 (1908).

While not challenging the foregoing principles, the court below decided that the members of the Puyallup Tribe no longer have "any special or treaty rights to fish" within reservation boundaries because "there is no longer a reservation" (Pet. A-51), and that State conservation measures, therefore, are applicable on

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[2] The right to fish, just as much as the land itself, constitutes a compensable property interest which may not be extinguished without action of Congress and payment of just compensation. *Shoshone Tribe* v. *United States,* 299 U.S. 476, 497 (1937); *United States* v. *Winans,* 198 U.S. 371, 381 (1905); *Whitefoot* v. *United States,* 293 F. 2d 658, 663 (Ct. Cl. 1961), *cert. den.* 369 U.S. 818 (1962).

[3] For State cases to the same effect, see *Pioneer Packing Co.* v. *Winslow,* 159 Wash. 655, 294 P. 557 (1930), and *State* v. *Sanapaw,* 21 Wis. 2d 377, 124 N.W. 2d 41 (1963), *cert. den.* 377 U.S. 999 (1964).

such lands to restrict Indian fishing. That holding is contrary to the overwhelming weight of authority requiring Congressional sanction for dissolution of an Indian reservation (which approval may not be found in allotment of the land or the conveyance of fee patents, the factors cited by the Washington Supreme Court) and, accordingly, is erroneous as a matter of law.

This Court has made abundantly clear that only Congress has the power to abolish an Indian reservation. *Seymour* v. *Superintendent,* 368 U.S. 351 359 (1962); *Creek County* v. *Seber,* 318 U.S. 705 (1943); *United States* v. *Celestine,* 215 U.S. 278 (1909). In *Celestine,* for example, this Court upheld exclusive Federal jurisdiction over a Tulalip Indian alleged to have committed a murder on patented land located within his tribe's original reservation, because:

> when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress. (215 U.S. at 285)

No legislative intent to effect termination can be found with respect to the Puyallup Reservation. Indeed, the rule that the conveyance of patents in fee to reservation land does not reflect a Congressional purpose to discontinue the special status accorded Indian reservations is conclusively evidenced by the Act of June 25, 1948, 62 Stat. 757, 18 U.S.C. 1151, as amended, which defines "Indian Country" for purposes of assertion of Federal jurisdiction to include:

> all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any*

> *patent,* and, including rights-of-way running through the reservation. . . . (Emphasis added.)

The application of Federal law to Indians on lands within a reservation patented and sold to a non-Indian, and the prohibition against the exercise of State jurisdiction in such situations pursuant to the 1948 Act, repeatedly have been sustained. *Seymour* v. *Superintendent, supra; Guith* v. *United States,* 230 F. 2d 481 (9th Cir. 1956); *State* v. *District Court,* 125 Mont. 398, 239 P. 2d 272 (1951).

Furthermore, the cases are legion to the effect that allotment does not oust exclusive Federal jurisdiction over Indian reservations with respect to matters involving Indians or otherwise so erase reservation boundaries as to sanction the application therein of State laws. *Seymour* v. *Superintendent, supra; United States* v. *Nice,* 241 U.S. 591 (1916); *United States* v. *Pelican,* 232 U.S. 442 (1914); *United States* v. *Celestine, supra.* Indeed, with specific reference to the Puyallup Reservation, this Court in *United States* v. *Celestine, supra,* quoted with approval from the opinion of Judge (subsequently Mr. Justice) McKenna in *Eells* v. *Ross,* 64 Fed. 417 (9th Cir. 1894) as follows (215 U.S. at 285):

> 'It is not disputed that the lands are a part of those set apart as the Puyallup Reservation, and that the reservation has not been directly revoked; but it is contended that the allotment of the lands in severalty, and afterwards making the Indians citizens, necessarily had the effect to revoke the reservation. There is plausibility in the argument, and it needs to be carefully considered. It is clear that the allotment alone could not have this effect (The Kansas Indians [Blue Jacket v. Johnson County] 5 Wall. 737, 18 L. ed. 667), and citizen-

> ship can only have it if citizenship is inconsistent with the existence of a reservation. It is not necessarily so. *Some of the restraints of a reservation may be inconsistent with the rights of citizens. The advantages of a reservation are not; and if, to secure the latter to the Indians, others not Indians are excluded, it is not clear what right they have to complain.'* (Emphasis added.)

Eells v. *Ross, supra,* affirmed the continued existence of the Puyallup Reservation following enactment of the Puyallup Allotment Act, and no legislation with respect to such lands has been passed since that case was decided of sufficient import to warrant changing the conclusion.[4] In short, Congress, which has the power, has not abolished petitioner's reservation, and the Supreme Court of the State of Washington has not the authority to do so. With respect to fishing on the reservation, the holding of the lower court that the Puyallup Indians are subject to State control is in irreconcilable conflict with the Treaty of Medicine Creek and must be reversed.[5]

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[4] In marked contrast to the general acts relied upon by the court below, when Congress actually has determined to end the status of an Indian reservation and thereby eliminate special rights secured to tribal members by Federal treaty, a statutory intent to do so usually has been clear. *Klamath and Modoc Tribes* v. *Maison,* 338 F. 2d 620 (9th Cir. 1964). This Court, however, now has under advisement the question of whether a treaty hunting right even survives termination. *Menominee Tribe* v. *United States,* No. 187, October Term, 1967.

[5] Assuming, *arguendo,* that the Puyallup Reservation no longer exists, the lands within its original boundaries still are "usual and accustomed" fishing grounds. Pet. A-44, 51. As the following discussion will demonstrate, petitioner's members also enjoy a far greater immunity from State regulation over fishing at such sites than their non-Indian fellow citizens.

B. Members of the Puyallup Tribe Fishing "At All Usual and Accustomed Grounds and Stations" Outside Petitioner's Reservation Are Subject Only to Regulations Demonstrated by the State To Be Indispensable to the Conservation of the Fish.

Under Article III of the Treaty of December 26, 1854, *supra*, the United States pledged for the benefit, *inter alia*, of petitioner's members that:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory . . .

There is no dispute that the fishing at issue in the instant case, other than that conducted within the reservation, occurred at such "usual and accustomed" sites. The court below concluded, however, that Puyallup Indians may be restricted by the State in the exercise of their off-reservation fishing rights by application of so-called "reasonable and necessary" regulations. This decision is premised upon a fundamental misconception both of the rights secured to petitioner by the Treaty of Medicine Creek and of the burden which the State must bear in order to justify imposition of restrictions upon members of the Puyallup Tribe.

As the historical context makes plain, the purpose of Article III was (1) to preserve to the signatory tribes rights, already existing, to fish freely at "usual and accustomed" places located outside the reservations to be established in accordance with the treaty, and (2) to grant to "citizens" the privilege, not previously enjoyed, to fish at such places "in common" with the members of the tribes. Of the identical clause in the Yakima Treaty of June 9, 1855, 12 Stat. 951, this Court explained in *United States* v. *Winans*, 198 U.S. 371, 381 (1905):

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them,—a reservation of those not granted.

The new condition referred to in *Winans*, of course, was the arrival of the settlers. In anticipation of this event, the treaty required the Indians to allow the "citizens" to share the former's usual and accustomed fishing places. But the treaty no less clearly acknowledged and promised to secure the right of the Indians—limited only by the requirement as to common use—to continue to take fish at such locations. *State* v. *Satiacum*, 50 Wash. 2d 524, 314 P. 2d 400, 406 (1957) (opinion of Donworth, J.).

Reflecting the special status of off-reservation treaty fishing rights, this Court has held that lands lying between Indian reservations and usual and accustomed fishing sites were subjected under the treaty to an equitable servitude permitting the Indians to cross such lands, despite the conveyance in fee of the intervening tracts to non-Indian owners without mention of any restrictions. *United States* v. *Winans, supra; Seufert Bros. Co.* v. *United States*, 249 U.S. 194 (1919). In *Tulee* v. *Washington*, 315 U.S. 681, 685 (1942), this Court also concluded that the State of Washington "is without power to charge the Yakimas a fee for fishing" outside their reservation, despite the nominal amount involved and the regulatory purpose of the measure in

question. What has really troubled the State and lower Federal courts, though, in construing the scope of off-reservation treaty fishing rights during the past twenty-five years is how far the dictum in *Tulee* to the effect that the State may impose upon Indians "restrictions of a purely regulatory nature . . . necessary for the conservation of fish" (315 U.S. at 684) modifies this Court's statement with respect to the licensing scheme there under consideration that the regulation must be "indispensable to the effectiveness of a state conservation program." *Id.* at 685.

A persuasive argument can be made that the State of Washington has no jurisdiction whatsoever to regulate off-reservation fishing at usual and accustomed places by treaty Indians.[6] As noted above, implicit in the very nature of the Treaty of Medicine Creek is the subordination by the Indians of their own sovereignty and powers as a nation to those of the United States, and the solemn undertaking by the United States to protect and secure the members of the Puyallup Tribe in the exercise and enjoyment of the property rights reserved by and for them under the Treaty. Such a protective relationship, this Court consistently has held, suffices in and of itself to place the property, activity or other subject matter enjoying the special Federal protection under the exclusive jurisdiction of the United States. *United States* v. *McGowan*, 302 U.S. 535 (1938); *United States* v. *Nice*, 241 U.S. 591 (1916); *United States* v. *Celestine*, 215 U.S. 278 (1909); *United States* v. *Kagama*, 118 U.S. 375 (1886); *Worcester* v. *Georgia*, 6 Pet. 515 (1832).

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[6] A number of courts have expressly so ruled with respect to off-reservation treaty hunting rights. *Holcomb* v. *Confederated Tribes of the Umatilla Indian Reservation*, 382 F. 2d 1013 (9th Cir. 1967); *State* v. *Arthur*, 74 Idaho 251, 261 P. 2d 135 (1953), *cert. den.* 374 U.S. 937 (1954).

Exclusive jurisdiction does not depend upon the place where the property is located or upon the activity being conducted. It exists as to the particular property, activity or other subject matter under Federal protection, even though no Indian reservation is involved and even though the place and subject matter are otherwise fully subject to State power and law. *United States* v. *McGowan, supra; United States* v. *Nice, supra; Perrin* v. *United States,* 232 U.S 478 (1914); *United States* v. *Thomas,* 151 U.S. 577 (1894); *United States* v. *Forty-Three Gallons of Whiskey,* 93 U.S. 188 (1876); *The Kansas Indians,* 5 Wall. 737 (1867). The protective interest of the United States evidenced in and by the Treaty of Medicine Creek extends to the fishing activities of the Puyallup Indians at all usual and accustomed places outside their reservation, and this matter, in accordance with the rule established in the foregoing cases, is, therefore, within the exclusive jurisdiction of the United States. Under such circumstances, the power to regulate off-reservation fishing can be exercised only by the Federal Government,[7] and not by the State of Washington.[8]

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[7] On July 15, 1967, the Secretary of the Interior issued final regulations governing "Off-reservation Treaty Fishing." 32 Fed. Reg. 10433 *et seq.* Although the Secretary's authority to limit Indian fishing is far from clear, see *Mason* v. *Sams,* 5 F. 2d 255 (W.D. Wash. 1925), and the new regulations fail to provide any standard for exercising Secretarial control, their promulgation illustrates how State restrictions may impinge upon a Federal function.

[8] The decision in *Kennedy* v. *Becker,* 241 U.S. 556 (1916), does not militate against this conclusion. In that case, the United States merely approved a private sale by Indians to other persons of lands in an existing State. In this case, the Puyallup Indians conveyed their land directly to the United States, and the Federal Government undertook a continuing obligation to secure them the fishing rights reserved under the treaty on lands outside the reservation but not within an existing State.

This Court, however, need not—and in the opinion of *amicus curiae* should not—strike down all State controls over off-reservation Indian fishing in order to rule for petitioner herein. The power to fish is not the power to destroy. Consistent with the original intent of Article III and mindful of the fact that most Indians still fish for subsistence purposes, this Court properly can (and should) hold that only such State conservation measures as are indispensable to the preservation of the fishery may be enforced at usual and accustomed off-reservation fishing sites against members of the Puyallup Tribe and other treaty Indians. *Maison* v. *Confederated Tribes of the Umatilla Reservation,* 314 F. 2d 169 (9th Cir. 1963), *cert. den.* 375 U.S. 829 (1964); *Makah Indian Tribe* v. *Schoettler,* 192 F. 2d 224 (9th Cir. 1951). As the court pointed out in the *Umatilla* case, conservation necessarily involves the allocation of a limited resource among those demanding to share in it—in this case commercial and sports fishermen, who in 1964 accounted for some 95%-97% of the total salmon catch, as well as Indians. Pet. A-32. Since non-Indians have a mere privilege to take fish, *Geer* v. *Connecticut,* 161 U.S. 519, 532 (1896), as contrasted with the treaty right vested in the Puyallup Tribe, "restriction of the fishing of Indians is justifiable only if necessary conservation cannot be accomplished by a restriction of the fishing of others." *Maison* v. *Confederated Tribes of the Umatilla Reservation, supra,* at 173.

Unlike the Ninth Circuit, the court below made no inquiry into the critical question—i.e., whether the State could accomplish its conservation objectives through more rigorous regulation of non-Indian fishing, or by other means not having so severe an impact upon peti-

tioner's members. Similarly, the court below did not consider whether preservation of the Puyallup River fishery, even assuming the need for some regulation, requires so severe a curtailment of Indian fishing as the State has imposed. (One issue ignored by the Washington Supreme Court, for example, is whether the goal of conservation could not be attained through imposition of regulations designed to effect the minimum escapement level necessary for propagation. See *Makah Indian Tribe* v. *Schoettler, supra.*) In other words, by adopting a "reasonable and necessary" standard, the lower court ruling affords members of the Puyallup Tribe no greater rights than those guaranteed to all persons in the State of Washington under the Fourteenth Amendment, and, for all practical purposes, gives no recognition or effect to the Treaty of Medicine Creek. *Torao Takahashi* v. *Fish and Game Commission,* 334 U.S. 410 (1948); *Begay* v. *Sawtelle,* 53 Ariz. 304, 88 P. 2d 999 (1939).

The decision below is patently contrary to the manifest intent of the treaty, to wit: to provide a small and distinct racial minority with legally enforceable rights, as opposed to privileges protected only by the requirements of equal treatment and the political process. As the facts of this case make painfully clear, the State of Washington, rather than restrict the more populous and powerful groups which account for the vast majority of salmon caught each year or the industries which pollute the waters in which the fish breed, has sought to prohibit through regulation fishing by a handful of Indians, including those who fish to live. If the Treaty of Medicine Creek is to have continued meaning, such an effort cannot be allowed to succeed.

II. THE PUYALLUP TRIBE IS NOT SUBJECT TO SUIT WITHOUT THE CONSENT OF THE TRIBE AND THE UNITED STATES, AND SUCH CONSENT HAS NOT BEEN GRANTED.

The immunity of Indian tribes from suit, absent consent of the tribe or the United States, is too firmly established in the law now to be questioned. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *Haile* v. *Saunooke*, 246 F. 2d 293 (4th Cir. 1957), *Cert. den. sub nom. Haile* v. *Eastern Band of Cherokee Indians*, 355 U.S. 893 (1957); *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*, 370 F. 2d 529 (8th Cir. 1967); *Maryland Casualty Co.* v. *Citizens Nat'l Bank of West Hollywood*, 361 F. 2d 517 (5th Cir. 1966). As this Court made plain in *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. at 512-3:

> The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. These Indian Nations [the Choctaws] are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal property did. (Footnotes omitted)

As a matter of fact and law, the United States has not authorized suits against the Puyallup Tribe, and the record herein contains no indication to the contrary. Petitioner not only has never consented to be sued, but has vigorously opposed assertion of jurisdiction in this case on grounds of sovereign immunity.

The conclusion, therefore, is inescapable that the Puyallup Tribe may not be sued in the courts of the State of Washington without its consent or that of the

United States. Nonetheless, the Washington Supreme Court, without even discussing the point, upheld the lower court's jurisdiction over the petitioner. Unless that unprecedented holding is reversed by this Court, the opinion below may serve as the predicate for further erosion by State courts of tribal immunity, thereby exposing the limited resources of Indian governments to indiscriminate litigation.

CONCLUSION

For the reasons set forth in this brief, the Association on American Indian Affairs, Inc., as *amicus curiae,* urges this Court to reverse the decision of the Supreme Court of the State of Washington.

Respectfully submitted,

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